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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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No. 1041 105

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DAVID W. WALLACE,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-  
PORT OF SAID PETITION.

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WILLIAM B. MAHONEY,

*Counsel for Petitioner.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

The petitioner, DAVID W. WALLACE, respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered on the 4th day of March, 1944, reversing a judgment of the United States District Court for the Western District of New York, which had directed the United States of America to refund to the petitioner the amount of income tax erroneously and illegally exacted and collected for the year of 1929.

**Opinions Below.**

1. An opinion by the Hon. John Knight, District Court Judge (R. 26-27), is reported in 2 F. R. D. 173.
2. An opinion by the Hon. John Knight, District Court Judge (R. 32-36), is reported in 50 F. Supp. 178.

3. The opinion of the Circuit Court of Appeals (R. 51) is not yet reported.

### **Jurisdiction.**

The judgment of the United States Circuit Court of Appeals was entered on March 4, 1944 (R. 58). The jurisdiction of this Court is invoked under the Judicial Code, Section 240(a), Title 28 U. S. C. A. 347, Act of February 13, 1925.

### **Statutes and Rules Involved.**

The statutes and rules involved are as follows: Rule 1, 6(b), 6(c), 60(b) and 83 of Federal Rules of Civil Procedure and Rules of the District Court for the Western District of New York, the pertinent provisions of which are set forth in Appendix "A" to this petition.

### **Question Presented.**

Was the order of the Trial Court of February 4, 1941, vacating and setting aside its order of May 19, 1938, a valid exercise of its power pursuant to the Federal Rules of Civil Procedure and the Rules of the United States District Court for the Western District of New York?<sup>1</sup>

### **Statement.**

Petitioner, together with his partner, Edward E. Trost, on October 14, 1933, instituted individual actions against Respondent seeking recovery for overpayment of their income tax for year of 1929 (R. 1, 14).

At the time of the institution of such actions, Edward E. Trost had a claim pending before the United States Board of Tax Appeals to recover an additional assessment on his income tax for the year of 1930 (R. 15).

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<sup>1</sup> The Government asserted in its brief in the Circuit Court alleged error as to the merits of the judgment, but abandoned such argument on the appeal (R. 41, 52).

The present action, as well as the claim pending before the Board of Tax Appeals, involved the identical question, namely: whether income of tax payers should be assessed as "ordinary income" or as "capital net gain" (R. 15). Trial of the above case was withheld pending decision of Board of Tax Appeals which was handed down in 1936 (R. 15).

The taxpayer noticed the case for trial from 1934 to November, 1937 (R. 8, 12). On November 9, 1937, at call of calendar, Government orally moved to dismiss case, which motion was granted (R. 9, 13) and no formal order of dismissal was entered by Government until May 13, 1938 (R. 7, 8, 13).

On November 4, 1940, Wallace moved to set aside order of May 13, 1938 and to restore case to the Ready Calendar pursuant to Rule 16 of the Rules of the District Court for the Western District of New York (R. 9-10). An affidavit of State Senator Walter J. Mahoney, an associate of petitioner's attorney, was submitted in support of the motion setting forth that the Legislature was in session from January 1, 1938 and that the order of dismissal was permitted to be entered through inadvertence (R. 10, 11). Government opposed such motion setting forth that seven years had elapsed since the institution of such action, without any action having been taken by plaintiff for trial of such case (R. 11-14). Petitioner's counsel submitted an affidavit assigning as reason for delay that United States Attorney and said counsel agreed to postpone the trial of said action pending outcome of a case then pending before Board of Tax Appeals involving 1930 income tax liability of Edward E. Trost, a partner of petitioner; such decision was rendered in March, 1936 (R. 14, 15). Affidavit further stated that facts in the said case were identical with the facts in the *Trost* case and further that said case was then on the trial calendar of said Court (R. 15, 16); and that in

both the above action and the *Trost* case, petitioner's counsel had submitted a proposed statement of fact to the United States Attorney, and that the same in *Trost* case was submitted to Washington and returned with a modified form of an agreed statement of fact; and that agreed statement of fact was submitted in above, as well as in *Trost* case, with such affidavit (R. 16, 17).

On January 25, 1941, United States Attorney, during pendency of motion, communicated with petitioner's counsel by letter as to substance of conversation between United States Attorney and Judge Knight as to furnishing of additional affidavit on behalf of Wallace and that taxpayer's counsel should attach to affidavit suggested findings of fact (Appendix B).

Affidavit requested, together with proposed stipulation of fact, was submitted (R. 14-17).

On February 14, 1941, the Court granted an order vacating and setting aside its order of dismissal of May 13, 1938 and restored the same to the trial calendar (R. 17, 18).

On March 20, 1941, petitioner's counsel inquired of United States Attorney as to delay concerning proposed stipulations of fact submitted three weeks prior to said date (Appendix C).

On March 21, 1941 United States Attorney enclosed original of stipulation of facts in *Wallace* and *Trost* cases, with request to sign and return same so that trial date might be designated (Appendix D).

On April 22, 1941, United States Attorney sent to petitioner's attorney one copy of stipulation of facts in *Wallace* and *Trost* cases, and original of same was filed in the office of United States District Court Clerk (Appendix E).

On August 5, 1941, Government filed a motion to vacate order of February 14, 1941, pursuant to provisions of Rule 60 of the Federal Rules of Civil Procedure (R. 18-22). Affidavit of Government's counsel stated that he did not

believe he had called Court's attention to Rule 60 either through his inadvertence or ignorance (R. 21). Taxpayer's attorney filed opposing affidavit setting forth that United States Attorney had consented to the granting and entry of the order of February 14, 1941 on condition that stipulation of facts would be served and early trial had (R. 23). This motion was denied (R. 26-27).

Government moved for dismissal of complaint at opening of trial, on ground that Court was without jurisdiction (R. 32, 33) and same was denied (R. 32).

On April 19, 1943, Court filed its holding that it had jurisdiction and that Commissioner of Internal Revenue had erroneously taxed the gains from the sale of securities as ordinary income instead of as capital net gain (R. 32-36). A judgment was entered on May 17, 1943, for Four Thousand Four Hundred Nineteen Dollars and Thirty-five Cents (\$4,419.35), together with interest (R. 39-40).

A notice of appeal was filed on August 13, 1943 (R. 40). The judgment was reversed on March 4, 1944 (R. 58). An opinion was delivered by Justice Frank (R. 52-57) wherein it was held that the vacating order of February 14, 1941, was unauthorized and therefore the Court had no jurisdiction to render a judgment (R. 57)). The Government, on appeal, abandoned its argument that, on the merits, Wallace was not entitled to be repaid the amount of the judgment (R. 52).

### **Specification of Errors to Be Urged.**

The Circuit Court of Appeals erred—

(1) In holding that the order of February 14, 1941, was wholly unauthorized and that the trial court had nothing before it and that its judgment on the merits was erroneous (R. 57).

(2) In holding that Government counsel could not waive the performance of a ministerial act, and that he could not

consent to the vacating of an order improperly entered (R. 53).

(3) In holding that Rule 6(b) of the F. R. C. P. does not permit a court, for cause shown, to extend the six months' period designated in Rule 60(b) of said rules.

(4) In holding that Rule 6(c) of the F. R. C. P. does not empower the Court, after expiration of its term, to do any act or take any proceeding in any civil action which has been pending before it (R. 56) and does not provide an exception to Rule 60(b).

(5) In holding that the kind of relief which petitioner sought on his motion to vacate and set aside order of dismissal, could not before the promulgation of present Rules, have been accorded him in ancillary proceedings.

### **Reasons for Granting the Writ.**

#### **I.**

The decision of the court below appears to be in direct conflict with its own decision to effect that the Court, without resort to a separate suit in the nature of a bill of review, could vacate judgment based upon a mistake of a clerk, whereby a Court is induced to enter a wrong judgment. *United States v. Sterling*, 70 F. (2d) 708 at 711. Certiorari denied, 293 U. S. 583, 55 S. Ct. 97.

Also, Court's decision is in direct conflict with its holding in *United States v. Sterling* (*supra*) to effect that carelessness of Government's counsel in failing to note case on general calendar call, and further failure of United States Attorney to inform special counsel of order of dismissal did not preclude Government of its right to have order of dismissal vacated, where the clerk had erroneously placed the same on the dismissal calendar.

The Circuit Court of Appeals in its opinion (R. 53) conceded that the dismissal order of November 9, 1937 and its formal granting and entry of May 19, 1938 was improper under the Rules of the District Court for the Western District of New York. Such an order, concededly improper, could not terminate this action inasmuch as under Rule XI of the local District Court Rules, no notice had been mailed by the clerk, as provided therein and further, any order entered pursuant to said Rule XI could only be entered without prejudice. This local rule was promulgated May 1, 1938 and is not in conflict with Rule 83 of the Federal Rules of Civil Procedure.

Further, the decision of the court below is in direct conflict with the decision of the Ninth Circuit (decided before Rules) which held that an order vacating previous order of dismissal, made after the expiration of term, as well as nine months after order of dismissal, was a proper exercise of Court's discretionary power. *Fidelity and Deposit Co. of Maryland v. Mac Gruer, et al.*, 77 F. (2d) 83.

## II.

The Circuit Court of Appeals has interpreted Rules 6(b) and 6(c), as well as 60(b) of the Federal Rules of Civil Procedure, in a manner that, instead of clarifying, has added to the confusion concerning the interpretation of said rules.

Several of the prior decisions interpreting said rules are supported by the Circuit Court's opinion in this case:

*Reed v. South Atlantic S.S. Co.*, 2 F. R. D. 475;

*Cassell v. Barnes, et al.*, 1 F. R. D. 15;

*Nachod and U. S. Signal Co. v. Automatic Signal Corp.*,  
32 F. Supp. 588;

*Moran v. Moran*, 31 F. Supp. 227.

Other decisions, in well-reasoned opinions, adopt a contrary rule of interpretation:

*McGinn v. U. S.*, 2 F. R. D. 562;

*Cavallo v. Agwilines, Inc.*, 2 F. R. D. 526;

*Prevede v. Hahn*, 36 F. Supp. 952;

*Schram v. O'Connor, et al.*, 2 F. R. D. 192.

The conflict on such question of law presented by the decision below should be settled by this Court. Not only is there such a conflict as to the decisions endeavoring to enunciate a legal interpretation, but there is also confusion as to content of record of proceedings of the American Bar Association Institute held in Cleveland in 1938 (see page 210) and also the record of Washington and New York proceedings (see pages 83, 84 and 135).

See *Schweinert v. Insurance Company of North America*, 1 F. R. D. 247 at 248.

Also, petitioner's counsel has been repeatedly queried as to the effect of the within decision and the probability of a final determination by this Court.

### Conclusion.

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

DAVID W. WALLACE,  
*Petitioner.*

STATE OF NEW YORK,  
County of Erie,  
City of Buffalo, ss:

David W. Wallace, being duly sworn, deposes and says that he is the petitioner in the above entitled matter; that the foregoing petition is true as to his own knowledge except as to the matters as therein stated to be alleged

on information and belief and that as to those matters he believes it to be true.

DAVID W. WALLACE.

Sworn to before me this 20th day of May, 1944.

DOROTHEA V. SHERMAN,

[SEAL.]

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